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In the Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: CARRIE LOIS QUALLS

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION
UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF LOUISIANA

OPPOSITION BRIEF TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION SUBMITTED BY RESPONDENT, K MART CORPORATION

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ARGUMENT

Defendant, **K Mart Corporation**, generally accepts the facts as set forth in the Statement Of The Case section of plaintiff's Petition for Writ of Mandamus and/or Prohibition. However, defendant opposes the relief requested by plaintiff for the following reasons.

I. PLAINTIFF HAS NOT INDENTIFIED A CONTROVERSY WHICH WOULD WARRANT THIS COURT'S ISSUANCE OF AN EXTRAORDINARY WRIT UNDER 28 U.S.C. § 1651(a)

To justify the granting of a writ under Rule 20 of this Honorable Court, as authorized by 28 U.S.C. § 1651(a) plaintiff must show (1) that the writ will be in aid of the court's appellate jurisdiction, (2) that there are present exceptional circumstances warranting the exercise of the court 's discretionary powers, and (3) that adequate relief can not be obtained in any other form or from any other court. Writs of mandamus and prohibition are used sparingly and only to confine an inferior court to the lawful exercise of its jurisdiction, to compel it to use its authority when it has a duty to do so, or to correct a clear abuse of discretion. *Evanson vs. Union Oil Company of California*, 619 F 2d 72 (1980), cert denied, 101 S. Ct 102 (1980). The remedy of mandamus within the Federal Courts is a drastic one, to be invoked only in extraordinary situations, amounting to a judicial usurpation of power. *Kerr vs. U.S. District Court for Northern District of California*, 96 S. Ct. 2119, 426 U.S. 394 (1976). Defendant submits that plaintiff has not shown how such a writ would be in aid of this Court's appellate jurisdiction, that there are exceptional circumstances warranting the exercise of this Court's discretionary powers and that adequate relief can not be obtained in any other form or from any other court. Plaintiff re-

quests an overturning of the district court's order compelling discovery. Generally, discovery orders are not jurisdictional and thus may not be reached under traditional concepts of mandamus except in the most extraordinary circumstances. *Colonial Times Inc. vs. Gash*, 509 F.2d 517 (D.C. App 1975). Specifically, plaintiff raises in her Petition the issue of physician/patient privilege and a claim of privilege does not enjoy a special status in considering a Petition for an Extraordinary Writ. *City of Los Angeles vs. Williams*, 438 F.2d 522 (9th Cir. 1971). Further analysis regarding plaintiff's failure to show circumstances warranting the issuance of an extraordinary writ is implicit in the additional arguments below.

II. THE DISTRICT JUDGE PROPERLY GRANTED DEFENDANT'S MOTION TO COMPEL AND WAS WITHIN HIS AUTHORITY OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff argues that this matter presents the issue of whether the discovery ordered by the district court was far beyond the scope of discovery permitted by the Federal Rules of Civil Procedure. However, as plaintiff has suggested, the issue of physician/patient privilege is a matter of substantive law, and therefore the Federal Courts are to look to the laws of the state when rendering decisions regarding privilege. See for example, *Erie R. Co. vs. Thompkins*, 58 S. Ct. 817, 304 U.S. 64 (1938); *Lind vs. Canada Dry Corporation*, 283 F Supp 861, 863-65 (D. Minn. 1968); Federal Rules of Evidence, Rule 501.

The physician/patient privilege, like any other privilege, is not an absolute privilege and the existence or waiver thereof is addressed by state common law or statute. Most state jurisdictions have held that the filing of a lawsuit placing plaintiff's physical condition directly

at issue operates as an implied waiver of the personal injury plaintiff's physician/patient privilege. See Berens, *Defendants' Right to Conduct Ex Parte Interviews with Treating Physicians in Drug or Medical Device Cases,* 73 Minn. L. Rev. 1451, 1464, footnote 63 (1989). Additionally, state legislatures have adopted statutes reflecting various public interests that override the privilege. See Id at 1462, footnote 56. In Louisiana, the laws governing physician/patient privilege are set forth by statute. The statute establishes the privilege and provides the circumstances when the privilege is waived. Specifically, La R.S. 13:3734(C)(3), provides that a personal injury plaintiff waives the physician/patient privilege by providing in pertinent part:

> If any person brings an action to recover damages, in tort or for Workers' Compensation or under Federal or State Laws, for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that *any* health care provider who has attended such person at *anytime* may disclose *any* communication which was necessary to enable him to diagnose, treat, prescribe or act for said patient [emphasis added].

This waiver of privilege includes oral and written communications. The statute does not prohibit oral communications between defense counsel and the physician once the privilege is waived. Additionally, the statute expressly provides that the privilege is waived as to *any* health care provider regarding *any* communication made by the plaintiff to that provider at *anytime*. In fact, subsection (5) indicates that a defendant would not even need an authorization as is requested in this case as long as the physician "reasonabaly believes" that a personal injury action has been instituted by the patient. However, in

this action, defendant has acted in consideration to both the medical provider(s) and the plaintiff by requesting a written authorization. Compare *Glenn vs. Kerlin*, 248 So. 2d 834 (La. App. 2nd Cir. 1971) (patient/plaintiff could not claim invasion of right of privacy by physician's disclosure of plaintiff's physical condition without patient consent). Compare also Louisiana Code of Evidence Article 510(B)(a).

The District Judge was certainly within his authority to compel the production of the medical records authorization, See *Hickman vs. Taylor*, 329 U.S. 495, 501-07 (1947) (discovery should provide "fullest possible knowledge of issues and facts before trial"); *Brown vs. Eli Lilly Corporation*, 131 FRD 176, 178 (D. Neb. 1988) (in a products liability action where plaintiff alleged that she contracted cancer due to her mother's injection of drugs, the plaintiff was ordered to sign authorizations for release of her medical records to defense counsel, by all providers of health services by whom she had been treated or received services); *Turick vs. Turick*, 121 FRD 32, 36 (SD NY 1988) (court held that defendant was clearly entitled to obtain medical records and reports of plaintiff pertaining to claims arising out of an accident and court ordered plaintiff to furnish defendants with a medical records authorization). Hence, plaintiff's suggestion that neither the Federal Rules of Civil Procedure nor "any case law cited by defendant or the Honorable District Judge authorizes this action" is without merit or substance. In fact, as the Louisiana statute is so clear, it probably would not even be necessary to obtain a court order granting this relief as pursuant to the statute's authority defendant may simply approach each of plaintiff's treating physicians since plaintiff's mere filing of this suit has waived the privilege. This would be the same type of "informal discovery" that defendants would perform with any other non-party witness and which is not prohibited by the Federal Rules. However, and

obviously, plaintiff's signed authorization would have the duel effect of placing the physicians at ease in knowing that the patient has expressly consented to the release of medical information and also that the patient has been placed on notice that the defendant will be seeking records and interviewing plaintiff's physicians.

Plaintiff's argument that defendant did not provide proof that the discovery may lead to relevant information is also without merit since plaintiff's complaint alleges she incurred injuries to her back, neck and jaw which alone shows that her current and prior medical condition are at issue. Plaintiff also admitted in her deposition that back injuries were the subject of her prior lawsuit against another department store which included a similar slip and fall accident. Obviously, plaintiff placed her medical condition at issue in this suit and prior medical history may be relevant. Thus, there has been no abuse of the Federal Rules of Civil Procedure or the discovery process.

III. THE ORDER COMPELLING DEFENDANT'S REQUEST FOR ORAL INFORMATION FROM PLAINTIFF'S PHYSICIANS WAS PROPER

Next, plaintiff argues that the medical authorization ordered by the court was improper since it authorized defendant to obtain information orally from plaintiff's physicians. Defendant again refers the Court to the Louisiana Statute which does not prohibit this practice. Plaintiff, on the other hand, cites *Alston vs. Greater South East Community Hospital*, 107 FRD 35 (D.D.C. 1985) for authority stating that this practice has been "condemned". However, plaintiff neglected to cite several cases which have held that this is not only acceptable, but is an encouraged practice. See generally *Doe vs. Eli Lilly and Company*, 99 FRD 126, (D.D.C. 1983); *Discovery: Right to Ex*

Parte Interview with Injured Parties's Treating Physician, 50 ALR 4th 714, § 3 at page 719; Berens, supra at 1473, footnote 104. Indeed, absent privilege, either counsel may conduct ex parte interviews with any witness concerning information relevant to the pending litigation and neither party is entitled to restrict this free flow of information. See *Doe v. Eli Lilly*, supra at 128. (no party "has anything resembling a proprietary right to any witness's evidence"). Although the Federal Rules expressly provide only for depositions, the Federal Rules do not act to prohibit informal interviews. To deny defendants the chance to meet privately with plaintiff's non-party treating physicians would give the plaintiff complete control over an important group of witnesses in a personal injury suit. Allowing access to the physician only by use of deposition is scarcely equal access to the physician as plaintiff's counsel may informally interview his client's physician at anytime as long as he has his client's consent (which is given 99.999% of the time). However, from a defendant's standpoint, a deposition is less likely to produce these spontaneous, candid responses from the physician. 50 ALR 4th at 717.

Other benefits from the practice of informal interviews include: decreased litigation costs, the potential to eliminate non-essential witnesses, early evaluation and settlement of claims, easier scheduling of interviews than depositions. Id. If defendants must depose each of plaintiff's physicians, while plaintiff need not, then the defendants alone must spend a significant amount of money to question a witness who may or may not turn out to possess relevant information. This could be an especially tremendous burden to obtain information from any out of state witnesses.

IV. THE PHYSICIAN/PATIENT PRIVILEGE WAS DESIGNED TO PROMOTE PHYSICAN/PATIENT CONFIDENCE, NOT TO FOSTER PLAINTIFF'S CONTROL OVER DISCOVERY. PLAINTIFF HAS OTHER AVAILABLE REMEDIES TO PROTECT NON-DISCOVERABLE MEDICAL INFORMATION.

As the court in *Doe v. Eli Lilly* noted, the physician/patient privilege is obviously designed to promote communication between the physician and the patient by placing confidence in the patient that certain information which might result in harm, humiliation, embarrassment or disgrace might never be disclosed. However, the privilege was not designed to be used as a litigation tactic by a personal injury plaintiff who may gain some advantage by controlling the release or the timing of the release of certain information that may be relevant to the case. Obviously, the medical history of a personal injury plaintiff is probably the most sought after information of a personal injury defendant. Hence, therein lies the danger of permitting the plaintiff to determine which records or physicians may be relevant to this proceeding as general rules of discovery provide that the parties are entitled to discover any information which might be relevant or which may lead to relevant information. For example, in her opposition brief to defendant's Motion to Compel, plaintiff argued that her gynecologist's records would be completely non-discoverable. It is probably *almost* a given that any information contained in a gynecologist's records would probably have nothing to do with this claim for injuries to plaintiff's neck, back, and jaw. However, *if* plaintiff also previously complained to her gynecologist of neck pain, jaw pain, headaches, etc., particularly prior to the accident in question, this would certainly be information relevant and discoverable in these proceedings.

If there is some dark or embarrassing secret lurking in plaintiff's medical background, certainly plaintiff already knows this and plaintiff has a remedy to protect the disclosure of such information. Plaintiff may apply to the court for a protective order to address such issues. If indeed plaintiff sought to hide information which dealt with an area that had absolutely nothing to do with this claim and which may otherwise harm or embarrass her, then defendant would concede to plaintiff's argument. It is not defendant's intention to harm or embarrass the plaintiff in this case. It is simply defendant's intention to defend itself in this lawsuit. It was plaintiff, not the defendant, who placed her medical condition at issue. Thus, plaintiff's argument that she is entitled to prior notice or that the authorization inhibits that right is also without merit. Despite plaintiff's opposition to the order compelling the medical records authorization, plaintiff more than anyone is aware of her medical history and still has ample remedy within the Rules of Civil Procedure to prohibit the disclosure of certain medical information. Compare also *Mid American Process Services vs. Ellisten*, 767 F.2d 684 (10th Cir. 1985) (writ of mandamus was not issued to compel Federal District Court to prevent discovery in a civil action since petitioners, by seeking postponement or protective order from District Court adequately protected their rights).

Defendant further notes that throughout these proceedings, in her opposition to defendant's Motion to Compel, in her Writ Application to the Fifth Circuit U.S. Court of Appeals, in her memorandum in support of her Motion to Stay the Execution of the Order Compelling the Medical Records Authorization submitted to the district court, and finally in her Petition to this honorable Court, plaintiff has not disclosed or even suggested what condition in her medical background needs to be protected. Plaintiff has

been unwilling to disclose this to defense counsel and has likewise been unwilling to disclose this to the three various courts. Although there may be other persons or legal organizations that may conceivably have an interest in an outcome of this matter before this honorable Court that provides a favorable litigation tactic to personal injury plaintiffs in general, plaintiff has so far been unwilling or failed to show her specific interest or her potential damage which would support an overturning of the district court's order compelling the medical records authorization.

V. PLAINTIFF HAS NOT INDENTIFIED A CONSTITUTIONAL RIGHT OR AN UNCONSTITUTIONAL VIOLATION THEREOF

Plaintiff also claims that her constitutional right to privacy has been violated by the district court's order. To the contrary, as explained above, the instant matter is simply an issue of physician/patient privilege which is defined by state substantive law and is not a matter of constitutional interpretation. It has been appropriately addressed by statute by the Louisiana Legislature. Plaintiff suggests that her right of privacy in the physician/patient relationship stems from the "penumbra" of rights discussed in *Griswold vs. Connecticut*, 381 U.S. 617, 85 S.Ct. 1678 (1965) and plaintiff draws a comparison between the cases of *Roe vs. Wade*, 410 U.S. 134, 93 S.Ct. 705 (1973) and *Doe vs. Bolton*, 410 U.S. 179, 93 S.Ct. 739 (1973) both of which dealt with a state's interest in regulating abortions. However, plaintiff has not explained how the disclosure of a certain plaintiff/patient's general medical history to a defendant attempting to defend itself in a personal injury lawsuit somehow violates a 14th Amendment right of privacy. Compare *Glenn*, supra. The Louisiana Legislature has established a physician/patient privilege as stated above. The legislature has also defined the circumstances

when the privilege is waived. Hence, plaintiff's privilege is sufficiently protected by state statute.

Finallly, even if plaintiff has demonstrated a fundamental right of privacy arising under the 5th or 14th Amendments, plaintiff has not demonstrated how this right has been unconstitutionally violated nor has plaintiff analyzed, by way of a balancing of interests formula, the state's interest in "interfering" with this right. For example, in response to this analysis, defendant would submit that the State of Louisiana has a compelling state interest to "interfere" with the "right" when a personal injury plaintiff has sued a defendant and made her medical condition a public issue by virtue of filing a lawsuit for personal injuries. After all, these same physicians to which plaintiff intends to prohibit defendant's access, may be subpoenaed by the court to testify at trial and an informal ex parte interview would merely allow the defendant access to relevant information prior to trial, outside of the public courtroom. An interview with plaintiff's physician would likewise not threaten plaintiff's medical treatment with that physician because the physician would remain legally and ethically obligated to give the patient proper medical care. Berens, supra at 1482. It is not as though defendant is attempting to inferfere with that relationship. The interest of the state in streamlining litigation and facilitating equal and fair access to information to litigants in personal injury suits is certainly in the best interest of the state's judicial system.

CONCLUSION

WHEREFORE, for the reasons outlined above, defendant, **K MART CORPORATION,** respectfully requests that plaintiff's Petition be denied and that the order of the Honorable F. A. Little, Jr., District Judge, be upheld and that plaintiff be required to immediately provide the medical records authorization as outlined in the District Judge's order.

Respectfully submitted,
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BY: _____
Robert Baldwin
Bar Roll #1224

CERTIFICATE

I, Robert Baldwin, do hereby certify that a true and correct copy of the above and foregoing document has been mailed to plaintiff through Daniel Street and to the Honorable F. A. Little, Jr., United States District Judge, by mailing same, postage prepaid, all on this _____ day of _____, 1993.

_____
Robert Baldwin